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Supreme Court, U.S.
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No. 89-494

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

IN RE: GERALD SPARKS - - - - Petitioner

Petition for Writ of Mandamus and/or Prohibition to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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QUESTION PRESENTED FOR REVIEW

Can Gerald Sparks ("Sparks") receive additional review of issues on which this Court has already denied certiorari by filing a Petition for Writ of Mandamus and/or Prohibition ("Petition")?*

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*Under Supreme Court Rule 27.2(b), the following are deemed respondents for all purposes of this proceeding: Character and Fitness Committee of Kentucky, Junius J. Beaver, Jr., Thomas P. Bell, Grant M. Helman, William J. Baird, III, Stuart E. Lampe, and Pat Gill. These same respondents were also respondents in the case of *Sparks* v. *Character and Fitness Committee of Kentucky* in which certiorari was granted and the case remanded to the Sixth Circuit for reconsideration (108 S. Ct. 744, Sparks' Appendix 14a) and for which certiorari was later denied by the Court after the Sixth Circuit's reconsideration and affirmance of the dismissal of this case. 109 S. Ct. 1120 (Sparks' Appendix, 28a).

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

1. *In Re: Gerald Sparks,* No. 89-5266 (6th Cir. June 8, 1989) (Order denying Sparks' petition for a rehearing en banc). (Appendix hereto, 1a).

2. *In Re: Gerald Sparks,* No. 89-5266 (6th Cir. April 26, 1989) (Order denying Petition for Writ of Mandamus). (Petitioner's Appendix, 2a-3a).

3. *Sparks* v. *Character and Fitness Committee of Kentucky,* 859 F. 2d 428 (6th Cir. 1988) (Opinion reconsidering prior decision in light of *Forrester* v. *White,* 484 U.S. 219, (1988) and affirming the district court judgment). (Petitioner's Appendix, 15a-27a).

4. *Sparks* v. *Character and Fitness Committee of Kentucky,* No. 85-5629 (6th Cir. July 16, 1987) (Order denying Sparks' petition for rehearing en banc). (Petitioner's Appendix, 12a).

5. *Sparks* v. *Character and Fitness Committee of Kentucky,* 818 F. 2d 541 (6th Cir. 1987) (Opinion affirming the district court judgment). (Petitioner's Appendix, 4a-11a).

6. *Sparks* v. *Character and Fitness Committee of Kentucky,* No. 85-209 (W.D. Ky. June 25. 1985) (Order and Memorandum Opinion). (Appendix hereto, 2a-4a).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Sparks has no grounds for invoking the jurisdiction of this Court. The All Writs Act, 28 U.S.C. § 1651, does not provide an independent basis of jurisdiction. *Baker Perkins, Inc.* v. *Werner & Pfleiderer Corporation,* 710 F. 2d 1561 (Fed. Cir. 1983). The authorities cited by Sparks in his petition, 28 U.S.C. 1257 (3) and the *United States* v. *Mendenhall,* 446 U.S. 554 (1980), are totally inapplicable.

STATUTE

28 U.S.C. §1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

No. 89-494

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

IN RE: GERALD SPARKS - - - - *Petitioner*

PETITIONER FOR WRIT OF MANDAMUS AND/OR PROHIBITION
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

STATEMENT OF THE CASE

In 1985, Sparks filed a civil rights action against the Character and Fitness Committee of Kentucky and others in the United States District Court for the Western District of Kentucky ("district court"). The district court dismissed the case. In *Sparks* v. *Character and Fitness Committee of Kentucky,* 818 F. 2d 514 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirmed that dismissal. After Sparks petitioned for a writ of certiorari to this Court, this Court remanded the case to the Sixth Circuit in light of this Court's decision, *Forrester* v. *White,* 484 U.S. 219 (1988), rendered after the Sixth Circuit's decision and opinion. After reconsidering its decision in light of *Forrester,* the Sixth

Circuit again affirmed the decision of the district court. *Sparks* v. *Character and Fitness Committee of Kentucky,* 859 F. 2d 428 (6th Cir. 1988). Sparks then filed a petition for a writ of certiorari with this Court, which was denied. 109 S. Ct. 1120 (1989).

Later, without any notice to these respondents, Sparks filed a petition for writ of mandamus in the Sixth Circuit, asking the Sixth Circuit to *again* review the due process, equal protection, and other issues raised in his original action. Sparks requested *the Sixth Circuit:* to vacate the October 18, 1988 judgment in the case of *Sparks* v. *Character and Fitness Committee of Kentucky,* 859 F. 2d 428 (6th Cir. 1988); to award $820,000 in compensatory and punitive damages; to waive Sparks into the Kentucky Bar; or, in the alternative, to remand the case to the district court for a trial on the issue of damages. The Sixth Circuit denied Sparks' petition for writ of mandamus because "[t]he Petitioner cannot now seek *via* a mandamus petition that which he failed to obtain under the regular course of litigation and appellate review." *In re: Gerald Sparks,* No. 89-5266 (6th Cir. April 26, 1989). Without any notice to these respondents, Sparks sought additional review of his petition for writ of mandamus by filing a petition for rehearing en banc, which was denied by the Sixth Circuit.

Sparks then filed the Petition in this Court.

SUMMARY OF ARGUMENT

Sparks cannot use a petition for writ of mandamus and/or prohibition to seek further review of issues that

have already been finally decided by the Sixth Circuit and for which a petition for certiorari has already been denied by this Court.

ARGUMENT

In his Petition, Sparks raises the same issues of due process and equal protection concerning the denial of his admission to the Kentucky Bar that he raised in the case of *Sparks* v. *Character and Fitness Committee of Kentucky*, 859 F. 2d 428 (6th Cir. 1988). This Court denied certiorari with respect to that case, 109 S. Ct. 1120 (1989). After certiorari was denied, Sparks filed a petition for writ of mandamus with the Sixth Circuit. The Sixth Circuit denied the petition, stating that "[t]he petitioner cannot now seek *via* a mandamus petition that which he failed to obtain in the regular course of litigation and appellate review." *In re: Gerald Sparks*, Case No. 89-5266 (6th Cir. April 26, 1989). Sparks has had his case decided at three levels, the district court, the court of appeals, and this Court. At some point, this litigation must end. Sparks has absolutely no basis for his writ of mandamus and/or prohibition and is merely seeking to reopen a case that has been adversely decided against him.

CONCLUSION

Respondents respectfully request that this Court deny Sparks' petition for writ of mandamus and/or prohibition.

Respectfully submitted,

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APPENDIX

No. 89-5266

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In Re:

GERALD SPARKS - - - - - - - *Petitioner*

ORDER—Filed June 8, 1989

BEFORE: WELLFORD and GUY, Circuit Judges; and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 85-209

GERALD M. SPARKS, - - - - - - *Plaintiff,*

v.

KENTUCKY CHARACTER AND FITNESS COMMITTEE, Et Al., - - - - - - *Defendant.*

MEMORANDUM OPINION—Entered June 25, 1985

This matter is before the court on the motion to dismiss of defendants Kentucky Character and Fitness Committee, Junius J. Beaver, Jr., Thomas P. Bell, Grant M. Helman, William J. Baird III, Stuart E. Lampe, and Pat Gill. They claim that the court lacks jurisdiction over the action because all of the defendants are protected by judicial immunity, that the complaint fails to state a claim upon which relief can be granted, and that plaintiff's complaint is in violation of Rule 8(a) of the Federal Rules of Civil Procedure and therefore, should be dismissed.

Plaintiff Gerald M. Sparks brings this suit *pro se* and *in forma pauperas* (sic) under 42 U.S.C. § 1983. He alleges that defendants, members and employees of the Kentucky Character and Fitness Committee and the Kentucky Board of Bar Examiners, prevented him from passing the Kentucky Bar examination in violation of his 8th, 5th, and 14th amendment constitutional rights. Specifically, Sparks contends that in 1980 Beaver placed a letter in his bar application file stating that he did not recommend Sparks to be admitted to the bar. Despite that letter, the Board per-

mitted Sparks to take the bar examination four times. He failed three of those examinations. The fourth was never graded. Thus, Sparks argues, the Committee unconstitutionally defrauded him by taking his application and examination fees knowing that it would never recommend him to the bar.

Without ruling on the other two contentions of the defendants, the court finds that the defendants are immune from suit. Thus, it shall grant their motion to dismiss. On April 17, 1985, this court entered an order dismissing plaintiff's claims against Chief Justice Robert F. Stephens. The court found that Stephens was protected by the doctrine of judicial immunity because consideration of an application for admission to the bar is judicial in nature and judges are absolutely immune from liability for damages for their judicial acts. *See Louis* v. *Supreme Court of Nevada*, 490 F. Supp. 1174, 1181 (D. Nev. 1980); *Gallahad* v. *Weinshienk*, 555 F. Supp. 1201 (D. Colo. 1983). It follows from that decision that the same acts performed by an arm of the Kentucky Supreme Court retain their judicial nature as well as their immunity.

In the recent Supreme Court decision *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S. Ct. 1989 (1984), the Court held that actions of the Arizona Supreme Court's Committee on Examinations and Admission and Board of Bar Examiners relating to the grading of the bar examination could not be divorced from the Arizona Supreme Court's exercise of its power. Although that decision dealt with the Committee's liability under the Sherman Act, the Court's discussion of the relationship between the Commiittee and Board, and the state Supreme Court is equally applicable here.

The Kentucky Supreme Court has extensive authority over the Board of Bar Examiners and the Character and Fitness Committee. Their members are appointed by the

Supreme Court and the Court must approve the rules and regulations promulgated by those members. *Supreme Court Rules* 2.000 & 2.040. In addition, the court directs which subjects are to be tested and the minimum score needed to pass the examination. *Supreme Court Rule* 2.090. Finally, the court retains the final authority to determine who will be admitted to practice law in the State. *Supreme Court Rule* 2.060. Just as in the Hoover case, the actions of the Committee and Board which concern consideration of an application for admission to the bar cannot be divorced from the actions of the Supreme Court of Kentucky. Hence, those actions are clothed with judicial immunity

Sparks' allegations concern improper consideration of his application for admission to the bar. For the reasons heretofore set forth those alleged acts are judicial in nature and the defendants are therefore, immune from suit. Accordingly, this court does not have a jurisdiction to hear Spark's claim, and his complaint shall be dismissed.

An order of dismissal it this day entered.

DATED: June 24, 1985

(s) Edw. Johnstone
Edward H. Johnstone, Judge
United States District Court